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NO. 93-36

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN H. DAVIS,

Petitioner,

vs.

GARY ALEXANDER, JACK GRAHAM, MARY FAULK AND WENDY HOLDEN, OFFICE OF RISK MANAGEMENT, GA

Respondents,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John H. Davis

Petitioner, Pro Se

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QUESTION PRESENTED FOR REVIEW:

COULD DISTRICT COURT APPLY CIVIL RIGHTS LAWS INCORRECTLY FOR SUMMARY JUDGMENT TO DISMISS CLAIMS OF DISCRIMINATION AND RETALIATION IN EMPLOYMENT BASED ON RACE, COLOR AND NATIONAL ORIGIN WHEN THE FACTS WERE CLEAR AS:

A. BOTH PARTIES HAD DEMANDED JURY TRIAL.

B. PETITIONER HAS PRESENTED SIGNIFICANT EVIDENCE FOR INITIAL BURDEN OF ESTABLISHING A PRIMA FACIE CASE OF INTENTIONAL RACIAL DISCRIMINATION AND RETALIATION.

C. RESPONDENTS HAVE DENIED FOR DISCOVERY BUT PROVIDED INTENTIONALLY INCORRECT AFFIDAVITS TO COVER UP EVIDENCE.

D. WITHOUT APPLYING DISPARATE AND IMPACT THEORIES BECAUSE THE PETITIONER WAS SINGLED OUT EACH TIME AS INTENTIONAL, PRETEXTUAL AND PREDETERMINED.

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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1992

JOHN H. DAVIS,

Petitioner,

vs.

GARY ALEXANDER, JACK GRAHAM, MARY FAULK AND WENDY HOLDEN, OFFICE OF RISK MANAGEMENT, GA

Respondents,

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES John H. Davis, Petitioner herein, Pro Se, and files this Petition for Writ of Certoirari. Petitioner's claims of discrimination and retaliation based on race, color and national origin were dismissed by Judge Robert Bryan were

dismissed without discovery and without jury trial and without setting new dates as per court Minute Order of July 24, 1991.

OPINION BELOW

The opinion of the Court of Appeals, Ninth Circuit was entered on October 16, 1992 and is attached as **Appendix A.** The petition for Rehearing was filed on October 28, 1992. The opinion denying the petition for rehearing was entered on February 22, 1993 and is attached hereto as **Appendix B.** The opinion of the United States District Court, Western District of Washington was entered on October 16, 1991 and is attached as **Appendix** C.

JURISDICTION

The United States Supreme Court has jurisdiction pursuant to Title VII, 42 U.S.C. Section 2000e et seq.

The Court of Appeals' Opinion in this matter was filed on October 16, 1992. This Court's jurisdiction is invoked under Title VII, Civil Rights Act of 1964 and 1985.

UNITED STATES CONSTITUTION

Title VII of the Civil Right Act of 1964, Amendments of 1981, 1983 and 1985 are set forth in **Appendix D.**

STATEMENT OF THE CASE

On July 1, 1986, **only** Petitioner became employee of the Office of Risk Management (ORM), by transfer from Office of Financial Management (OFM) by **an Interagency Agreement** as retaliation for filing lawsuit against the OFM, state of Washington which Petitioner believes that State Courts applied laws incorrectly while evidence was clear to the Judge.
(OFM had denied promotions, downgraded position of the Petitioner because the OFM downgraded and then proposed legislation to transfer from OFM to ORM under an Inter-agency Agreement to keep direct control on the petitioner).

On July 17, 1986, Mr. Eric Payne (supervisor), Assistant Director prepared classification Questionnaire (CQ) based on

the job duties and assignments for Petitioner's position as Working Title of "Risk Management Claims Specialist" and promised as "shall be changed in future".

Petitioner's position was never changed in spite of several verbal and written requests. Mr. Payne had verbally many times stated that he was sorry because he could not change the position due to pressure from director and OFM officials. On September 17, 1986 and on February 19, 1987, the Petitioner made written requests for Proper Title and Pay for his position to Mr. Eric Payne had no written response but verbally he stated that he had a pressure from director and OFM officials not to change the position.

Since July 1986 through November 1987, white employee were upgraded and promoted to the higher positions while the Petitioner's position was left unchanged in spite of many requests for upgrade.

In November 1987, respondent, Gary Alexander, Asstt. Director was transferred

from OFM to ORM, to replace Mr. Payne and to discriminate and retaliate against the Petitioner because he is friend of Mr. Dan Pensula and Mr. Colum Liska against whom Petitioner had previously filed lawsuit.

On November 19, 1987, Petitioner wrote memorandum to Mr. Alexander regarding STATE SERVICE TO CLIENTS because Petitioner's calls were forwarded to Jack Graham which cause delay in their inquiries. Ms. Denise stated that she was just doing her job; she has been ordered by Alexander to forward the Petitioners's calls to Jack Graham.

On January 4, 1988, Mr. Alexander, respondents changed procedures for handling Sundry claims, to effective the performance of the Petitioner.

On January 8, 1988, Mr. Payne had prepared satisfactory annual Performance Evaluation for the Petitioner from July 1986 through January 1988 with remarks as: "Events which brought Mr. Davis from OFM to GA and with changed statute and procedures, performed duties which are much different

and which are not reflect in the current CQ. It is my hope that new changing of responsibilities can be developed for Davis to reflect his education, experience and interests".

On March 25, 1988, Memorandum from Mr. Liska to Ms. Espeseth, OFM regarding Sundry Claims because Mr. Alexander never deliver them to legislature, to affect performance of the Petitioner.

On May 2, 1988, Mr. Adam Moore, attorney returned several mis-delivered letters which Mr. Alexander's secretary had mailed, to affect Petitioner's performance.

The petitioner was given numerous unfounded memorandums by Mr. Graham on the direction of Mr. Alexander when the old supervisor of the Petitioner (Mr. Payne) was ready to leave in May 1988.

In June 1988, the Petitioner was forced to sign an incomplete CQ, violating Personnel Merit System Rules.

On July 15, 1988, Petitioner was given a bad performance by Mr. Graham after Mr.

Payne left the state and Mr. Graham was supervisor only for two months while annual performance was already made by Mr. Payne (old supervisor).

Petitioner was denied promotions by the respondents to Financial Manager, Risk Analyst (twice) and Tort Claims Investigator 1 positions, the Petitioner was qualified candidate on the state register for these positions. White people were promoted and hired on these positions.

On August 29, 1988, Petitioner was put under Corrective Action Plan by respondents Graham and Alexander while the Petitioner provided documentations that allegations were wrong but respondents continued the Corrective Action Plan.

Before August 1988, white employees were upgraded or promoted to the higher positions. (Mr. Chris Curtis as Loss and Control Coordinator; Ms. Judi Arnold as Administrative Assistant -3; Mr. Steve Sage as Input Scheduler-1, Input Scheduler-2 and then Input Scheduler-3; Ms. Kathy Gastreich

as Risk Analyst, Mr. Harry Mauer as Risk Analyst and Mr. Mike Kirkpatrick as Tort Claims Investigator-1). Petitioner was more qualified and had more experience in claims because the petitioner consolidated and centralized in 1984 and then researched laws and made amendments to the RCW.

On January 30, 1989, Petitioner filed a complaint with Washington State Human Rights Commission and with EEOC but respondents continually discriminated and retaliated which had caused serious problems to Petitioner's health.

Before August 1988, white employees On May 15, 1989, Petitioners procedure for handling his assignments were changed again by new supervisor, Ms. Kate Steele on the direction of respondent Mr. Alexander.

Finally, Petitioner resigned as of May 31, 1989 at the advice of his family doctor and at the advice of the Heart Specialist.

On June 9th and 13th, 1989, Petitioner went under surgeries at St. Peter Hospital, Olympia and St. Joseph Hospital at Tacoma

Washington. Petitioner has been damaged in health and financially by medical bills.

On January 24, 1990, Petitioner filed Complaint for **JURY DEMAND** in US District Court at Tacoma, Washington as **Pro Se** and the case was assigned To Judge, Tanner.

On May 21, 1990, Petitioner filed Motion and Affidavit for Default Judgment.

On May 24, 1990, respondents filed Answers and requested **JURY DEMAND.**

On June 14, 1991, respondents' filed Motion for Summary Judgment/Dismissal and was Noted July 12, 1991.

On June 26, 1991, Petitioner filed Memorandum in Opposition to Motion for Summary Judgment with documents.

On July 8, 1991, Petitioner filed his Affidavit in Opposition to Motion for Summary Judgment with documents.

On July 8, 1991, Petitioner filed Motion to Compel for discovery, for accurate answers & production of documents and was Noted on July 26, 1991. Respondents had not answered to the

Interrogatories and nor provided requested documents.

On July 18, 1991, Petitioner filed Motion to Compel for Deposition for discovery and was Noted on August 2, 1991. Respondents' attorney made Objections To Subpoena Duces Tecum and also verbally **stated to Petitioner that he would protect his clients and would block the discovery.**

On July 18, 1991, Petitioner filed Motion to Extend Trial Date for discovery and was Noted on August 2, 1991 Because the respondents' attorney refused to discovery.

On July 24, 1991, Judge Jack Tanner Ordered all pending dates are hereby stricken. New dates shall be set by the judge to whom this case is assigned.

On September 3, 1991, Petitioner filed Second Motion to Compel for discovery and was Noted on September 20, 91. Due to the objections of the respondents to the facts.

On October 10, 1991, Petitioner's case was dismissed by new Judge, Robert Bryan **without setting new dates for** discovery.

On November 7, 1991, Petitioner filed Notice of Appeal with the US District Court at Tacoma, Washington.

On January 21, 1992, Petitioner filed Appellant's Informal Brief with Excerpts of Records to the Court of Appeals, 9th Cir. as **Pro Se.**

On October 16, 1992, Petitioner's appeal was denied by the Court of Appeals, the Ninth Circuit.

On October 28, 1992, Petitioner filed Petition for Rehearing to the Court of Appeals, Ninth Circuit. The petition was denied on February 22, 1993.

REASONS

THE WRIT of Certiorari should be granted for six reasons:

1. Petitioner was born in Pakistan, is an Asian national origin, the skin color is black, migrated to USA in 1971 and became USA citizen in 1978. Title VII, 42 USC. Sec. 2000e. (See APPENDIX D)

2. Petitioner has engaged in a protected activity, he suffered an adverse employment

actions, there was causal link between the employee's action and the harm suffered. Petitioner provided to the respondents actual 70 documents during deposition, out of which 17 documents were submitted with **MEMORADUM AND AFFIDAVIT BY PETITIONER (PLAINTIFF) IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/DISMISSAL from A TO Q,** including the **APPENDICES F and G.**

Jurado v. Eleven Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987)

3. Petitioner has presented significant evidence for initial burden of establishing **a prima facie** case of intentional racial discrimination and retaliation. Petitioner provided to the respondents actual 70 documents during deposition, out of which 17 documents were submitted with **MEMORADUM AND AFFIDAVIT BY PETITIONER (PLAINTIFF) IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/ DISMISSAL from A TO Q,** (APPEND. **F and G).**

Title VII, 42 USC. Sec. 2000e-2(a)(1)

Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir, 1982)

Hison v. King & Spalding, 467 U. S. 69 (1984)

Judie v. Hamilton, 872 F.2d 919 (9th Cir. 1989)

McDonald v. Santa Fe Trail Transport. Co., 427 U. S. C. 273 (1976)

Texas Dept. of Comm. Affairs v. Burdine., 450 U. S. C. 248 (1981)

Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3rd Cir. 1985)

Cassino v. Reichhold, 817 F.2d 1338 (9th Cir. 1987)

4. Respondents failed to proof the burden and or rebut the prima facie evidence. Respondents' all adverse actions were motivated by race are supported by actual documents. Petitioner had made three motions to the court for discovery. **The respondents have denied for discovery but provided the court intentionally incorrect affidavits which mislead the court and do not reflect the accurate records.**

5A. Petitioner was singled out in all facts stated in the STATEMENT. More than

one "but for" cause can contribute to an employment decision, and if any one of those determinate factors is discriminatory, case for **disparate racial treatment. (SEE APPENDICES F and G). Only Petitioner's** Civil Rights were violated and was forced to resign due to respondents' discriminatory treatments, denied Upgrade or proper position, denied promotions to Financial Mgr., Risk Analyst (twice) and Tort Claims Investigator 1 positions while Petitioner was qualified candidate on the State Register for these positions. Petitioner had a Master degree and over 20 years of experience.
Court of Appeals, 9th Circuit states in opinion at page 3 as below:

"In 1986 the Washington legislature passed legislation transferring Davis' position, **among others,** from OFM to the Department of General Administration, Office of Risk Management (ORM)."

OFM and ORM records indicate that An Interagency Agreement was made to transfer

the petitioner only. (APPENDIX E). The Petitioner had been singled out and had presented significantly probative evidence to support of his claims. Petitioner had provided over 70 documents to respondents during deposition but respondents are making objections to blocking their discovery. Petitioner provided 17 actual documents with the **MEMORADUM AND AFFIDAVIT BY PETITIONER IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/DISMISSAL (A TO Q).**

5B. The petitioner's position was not unique as respondents has mislead the court. The petitioner was specialized in claims and all operations in ORM. The records and employees clarify that Petitioner had consolidated, centralized all claims and all white employees learned from him. **The Disparate Treatment and Disparate Impact.**

McDonald Doug. Co. v. Green, 411 U. S 792, 36 L Ed. 2d 668, 93 S. Ct.1817,1824 (1973 **Griggs v. Duke Power Co.** (1971) 401 US 424, 28 L Ed. 2d. 158, 91 S Ct. 849

6. No New Dates were set as per Order of Judge, Jack Tanner on July 24, 1991, as set forth in Appendix E.

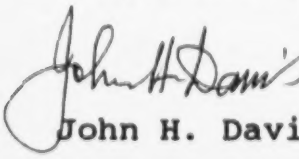
> **"ORDERED all pending dates are hereby stricken. New dates shall be set by the judge to whom this case is assigned."**

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: July 1, 1993.

Respectfully submitted,



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NOT FOR PUBLICATION

Filed Oct. 16, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN H. DAVIS,

Plaintiff-Appellant,

v.

GARY ALEXANDER; JACK GRAHAM; MARY FAULK; WENDY HOLDEN; OFFICE OF RISK MANAGEMENT; DEPARTMENT OF GENERAL ADM.,

Defendants-Appellees.

NO. 91-36218

D.C. NO. CV-90-5034-RJB

MEMORANDUM*

Appeal from the United States District Court for the District of Washington

Robert J. Bryan, District Judge, Presiding

Submitted October 13, 1992**

Before: BEEZER, HALL, and WIGGINS, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

John H. Davis, a native of Pakistan, appeals pro Se the district's summary Office of Risk Management 1/ and his judgment in favor of his former employer, supervisors (defendants) in his action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000(e) et seq. In his complaint, Davis claimed that his job classification and pay were not commensurate with his job responsibilities, and that he was denied a promotion, all in retaliation for his prior lawsuits and because of his race. The district court found that the changes in Davis' job description and the adverse employment actions were based on legitimate nonpretextual business decisions, and were not done to retaliate against Davis or to discriminate against him on the basis of his race. We have jurisdiction under 28 U.S.C. Sec. 1291 and we affirm.

1/ The Office of Risk Management is a division of the Washington State Department of General Administration.

I

Background

Davis is a native of Pakistan. From August 1983 to July 1986, he was employed by the Washington State Office of Financial Management (OFM). Davis repeatedly requested a promotion or upgrade in his position. In response to these requests the personnel department reviewed Davis' position. In June 1984, the personnel department reallocated Davis' position from Financial Systems Analyst to Tort and Sundry Claims Representative at a lower salary range. In 1986 the Washington legislature passed legislation transferring Davis' position, among others, from the OFM to the Department of General Administration Office of Risk Management (ORM). In April 1985, Davis filed suit in state court for racial discrimination. The suit was tried in June 1987 and incorporated all events up to and including Davis' transfer to the ORM in 1986. The state court found no evidence of racial discrimination in reallocation of

Davis' position, in denial of promotions, nor in Davis' transfer to the ORM.

In January 1989, Davis filed a complaint with the Washington State Human Rights Commission claiming the following actions were based on racial discrimination and retaliation for his 1985 suit: (1) his position in the OFM was reallocated downward and was transferred to the ORM; (2) he was given an unjustified poor performance review in 1988 by the ORM; (3) he was denied a promotion to Tort Claims Investigator; (4) he received a "corrective action memo" which contained inaccurate information; (5) he was denied subsequent promotions while Caucasian were granted promotions.

In May 1989, Davis resigned his position with the ORM. In July 1990, he filed the present action.

II

Discussion

"This court reviews a grant of summary judgment de novo to determine whether,

viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the correct substantive laws." **American Trading, Inc. v. Berrie & Co., 966 F. 2d 1284, 1287 (9th Cir. 1992).** The ultimate question of discrimination is a finding of fact which we review for clear error. **Fragante v. City and Cty. of Honolulu, 888 F.2d 591, 594 (9th Cir.) (citation omitted cert. denied, 494 U.S. 1081 (1990).**

A. Racial Discrimination

To prevail in a Title VII case for disparate racial treatment, the plaintiff must show that he was "singled out and treated less favorable than others similarly situated on account of race." Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982). The plaintiff bears the initial burden of establishing a prima facie case of intentional discrimination. Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1459

(1985), cert. denied, 475 U.S. 1048 (1986).

To established a prima facie case of intentional discrimination sufficient to foreclose summary judgment, the plaintiff must identify actions by the employer, that if unexplained, give rise to an inference of discriminatory conduct. Id. "Once the plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by 'articulating some legitimate, nondiscriminatory reason for the adverse action.'" Fragante, 888 F.2d at 595 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). If the employer presents legitimate reasons for its actions, the burden shifts back to the plaintiff to show that the purported reasons are merely a pretext for discrimination. Fragante, 888 F.2d at 595.

1. Denial of Promotion

Assuming, as did the district court, that Davis established a prima facie case

that he was denied a promotion because of his race, it is clear from the record that the defendants have articulated a legitimate nondiscriminatory reason for denying Davis the promotion to the Tort Claims Investigator position he sought. In support of their motion for summary judgment, defendants submitted an affidavit detailing the superior qualifications and experience of the Caucasian employee who was promoted to this position instead of Davis. Davis has failed to show that defendants' reason for denying him the promotion was a pretext for invidious discrimination. Accordingly, the district court's finding of no discrimination in the defendants' failure to promote Davis was not clearly erroneous, and the grant of summary judgment on this claim was proper. See Fragante, 888 F.2d at 599 ("an employer's decision may be justified by the hired employee's superior qualifications unless the purported justification is a pretext for invidious discrimination").

2. Other Adverse Actions

Davis' claim that defendants' other adverse actions were motivated by race is not supported by the record. Rather, the record indicates that the actions of defendants' which Davis perceived as motivated by race, were in reality mandated by the legislative changes which substantially affected all employees within the ORM.

It is clear that Davis could not show that he was singled out and treated less favorable than others similarly situated on account of race because Davis' position as Tort and Sundry Claims representative was unique and dissimilar from other jobs with in his department. Davis does not, however, present any evidence to support his assertions that his poor performance review and the corrective action memo he received were the result of discriminatory motive. Thus, Davis has failed to show disparate racial treatment with regard to the adverse actions, and summary judgment

was properly granted for the defendants on this claim. See Forsberg v. Pacific Northwest Tel. Co., 840 F.2d 1409, 1419 (9th Cir. 1988).

B. Retaliation

To establish a prima facie case of discriminatory retaliation, the plaintiff must show that: (1) he engaged in a protected activity; (2) he was subjected to an adverse employment action; and (3) there is a causal link between the adverse employment action and the protected activity. Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987).

Here, Davis has shown that by filing prior lawsuits against the OFM alleging racial discrimination, he engaged in protected activity. Davis has also shown that he was subjected to adverse employment actions by the defendants. Davis has failed to show, however, that the adverse employment actions were somehow due to his having filed the prior lawsuits. Davis has presented no evidence to supported his

claim of retaliation. In affidavits submitted by defendants in support of their motion for summary judgment, defendants state that they did not know of Davis' prior lawsuits against the OFM until Davis told them of the suits, and that they did not communicate with the defendants in those prior suits. Thus, Davis has failed to show a retaliatory motive in the defendants' employment actions, and the district court properly granted summary judgment for the defendants on this claim. See Jurado, 813 F.2d at 1411-12.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FILED FEB 22 1993

FOR THE NINTH CIRCUIT

JOHN H. DAVIS, NO. 91-36218

Plaintiff-Appellant, D.C. NO.

v. CV-90-5034-RJB

GARY ALEXANDER; JACK GRAHAM; ORDER
MARY FAULK; WENDY HOLDEN;
OFFICE OF RISK MANAGEMENT;
DEPARTMENT OF GENERAL ADM.,

Defendants-Appellees.

Before: BEEZER, HALL, and WIGGINS,
Circuit Judges.

The appellant's petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 91-36218

CT/AG#: CV-90-5034-RJB

JOHN H. DAVIS

Plaintiff-Appellant

v.

GARY ALEXANDER; JACK GRAHAM; MARY FAULK; WENDY HOLDEN; OFFICE OF RISK MANAGEMENT; DEPARTMENT OF GENERAL ADMINISTRATION.

Defendants-Appellees

APPEAL FROM the United States District Court for the Western District of Washington (Tacoma).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that judgment of the said District in this cause be, and hereby is AFFIRMED.

Filed and entered: 10/16/92

Filed Oct 15 1991

United States District Court

WESTERN DISTRICT OF WASHINGTON AT TACOMA

JOHN H. DAVIS,

JUDGMENT IN A CIVIL CASE

V. CASE NO.

GARY ALEXANDER, JACK GRAHAM C90-5034TB
MARK FAULK and WENDY HOLDEN,
OFFICE OF RISK MANAGEMENT,
DEPARTMENT OF GENERAL ADM.

☐ Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendants' Motion for Summary Judgment is GRANTED and Plaintiff's claims are DISMISSED;

Plaintiff's Second Motion to Compel for Discovery is DENIED AS MOOT;

Defendants' Motion to Shorten Time for Defendants' Motion to Dismiss Based Upon Failure to Confer RE: Preparation of Pretrial Order is DENIED AS MOOT:

Defendants' Motion is Dismiss Based Upon Failure to Confer RE: Preparation of Pretrial Order is DENIED AS MOOT;

Plaintiff Motion to Extent Trial Dates for Discovery is DENIED AS MOOT;

Plaintiff's Motion to Compel for Deposition Subpoena to Mr. Gregg Goins is DENIED AS MOOT; and

Plaintiff's Motion to Compel for Accurate Answers and for Production of Documents is DENIED AS MOOT.

Date: October 15, 1991 Clerk BRUCE RIFKIN

Signed by Deputy Clerk

Filed and Entered on Docket Oct 10 1991

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

JOHN H. DAVIS,

Plaintiff,

vs.

GARY ALEXANDER, JACK GRAHAM, MARY FAULK and WENDY HOLDEN, OFFICE OF RISK MANAGEMENT, DEPARTMENT OF GENERAL ADM.,

Defendants,

NO. C90-5034TB

ORDER RE: PENDING MOTIONS

This matter comes before the court on the following motions:

1) Defendants' Motion for Summary Judgment,

2) Plaintiff's Second Motion to Compel for Discovery,

3) Defendants' Motion to Shorten Time for Defendants' Motion to Dismiss Based Upon Failure to Confer Re Preparation of Pretrial Order,

4) Defendants' Motion to Dismiss Based Failure to Confer Re Preparation of

Pretrial order,

5) Plaintiff's Motion to Extend Trial Date for Discovery,

6) Plaintiff's Motion to Compel for Deposition Subpoena to Mr. Gregg Goins, and

7) Plaintiff's Motion to Compel for Accurate Answers and for Production of Documents.

The court has considered the pleadings filed in support of and in opposition to the motion and the file herein. For the reasons stated in this decision, the defendants' motion should be granted and the plaintiff's claims should be dismissed.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issue of material fact. T. W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626 (9th Cir. 1987); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A motion for summary judgment must be granted against

the nonmoving party who fails to prove an essential element of the claim. A genuine dispute over a material fact exists if the evidence is such that a reasonable jury could return a verdict of the nonmoving party. Anderson v. Liberty Lobby, Inc., 447 U.S. 242 (1986). The court must also consider the substantive evidentiary burden that the nonmoving party must meet at trial. T. W. Elec. Service v. Pacific Elec. Contractor, Supra at 632.

FACTUAL BACKGROUND

The plaintiff is alleging racial discrimination and retaliation against the defendants, who are the state supervisors of the office of Risk Management. Plaintiff was employed in that office as a Tort and Sundry Claims Representative from July 1, 1986 until his resignation in May, 1989. This lawsuit is plaintiff's third litigation of racial discrimination claims against the State of Washington. The previous lawsuits were resolved after trial in favor of the state.

Plaintiff is a native of Pakistan and is of Asian origin. He had previously been employed as a Financial Systems Analyst for the Office of Financial Management. In July, 1986, legislative enactments caused plaintiff's position to be transferred to the Office of Risk Management ("ORM"). His position became a unique, one person position in state government.

In November, 1987, further legislative changes in the state's system of risk management resulted in the assignment of new supervisors in ORM and new, more strict procedures were implemented. Along with other employees, plaintiff found some difficulty adjusting to these changes. He received unfavorable employment evaluations, with recommendations that he attend supplemental classes to improve his oral and written communication skills. Plaintiff contends that the changes are solely the result of continued racial discrimination and retaliation because of his previous lawsuit.

Plaintiff also applied for a position as Tort Claims Investigator. The position was given to a white male. Plaintiff claims that this is another example of the state's racial discrimination against him.

LEGAL AUTHORITY RE RACIAL DISCRIMINATION AND RETALIATION

A. Racial Discrimination

A prima facie claim for racial discrimination under Title VII, 42 U.S.C. Sec. 2000e requires the plaintiff to show, by probative evidence, an inference that an employment decision was based on a discriminatory motive. Plaintiff must show the following elements:

1. that plaintiff belongs to a racial minority;
2. that he was qualified for, and/or was adequately performing his job;
3. that he was denied a job or the position was taken from him because of his race; and
4. that the job remained open, or was filled by a person with similar or

lesser qualifications.

If the employee sustains his burden of proof, the employer may then offer evidence of some legitimate, nondiscriminatory reason for the employment decision. On summary judgment, the employer's burden is one of production of probative evidence supporting a reason for the decision. The employer may produce evidence of a business necessity not based on race but on a genuine business need that has a manifest relationship to the employment in question or a demonstrable relationship to successful performance of the job.

If the plaintiff bears the first burden of proof, and the defendant employer bears its burden of proof, as set out above, then the plaintiff must show that the employer's alleged reason is pretextual, that is, that the employer intentionally discriminated against him and that this intent more likely than not was the basis of the adverse employment action. Plaintiff must show that, but for his

status as a member of a protected class, the adverse employment decision would not have been taken. The "but for" test doesn't require the plaintiff to prove that the discriminatory reason was the determining factor. Plaintiff does not have show that discrimination was the employer's sole or exclusive motive, but that the discriminatory reason made a difference in the employment decision. More than one "but for" cause can contribute to an employment decision, and if any one of those determinative factors is discriminatory, Title VII has been violated. 42 U.S.C. Sec. 2000e-2 (a)(1); Hison v. King & Spalding, 467 U.S. 69 (1984); Judie v. Hamilton, 872 F.2d 919 (9th Cir. 1989); McDonald v. Santa Fe Trail Transportation Co. 427 U.S. 273 (1976); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3rd Cir. 1985); Cassino v. Reichhold, 817 F.2d 1338 (9th Cir. 1987)

B. Retaliation

A claim of retaliation requires that the plaintiff show that 1) he engaged in a protected activity; 2) he suffered an adverse employment action; and 3) there was a causal connection between the employee's action and the harm suffered. Jurado v. Eleven-Fifty Corp. 813 F.2d 1406, 1411 (9th Cir. 1987). Plaintiff's subjective belief that he was suffered retaliation is not sufficient to create a factual issue. Williams v. Cerberonics Inc., 871 F.2d 452, 459 (4th Cir. 1989).

DISCUSSION

Here, plaintiff has, essentially, two claims: one, that he was forced to resign because of the defendants' discriminatory treatment and two, that he was denied promotional opportunities because of his race and previous lawsuits. He has shown that he is a member of a protected class, but there are substantial questions of whether he was sufficiently shown evidence of second, third and fourth elements of a

prima facie case of racial discrimination. However, considering the defendants' motion in a light most favorable to the plaintiff, the court will assume that plaintiff has shown a prima facie case of race discrimination.

The defendant has stated several reasons for their employment decisions, which they argue are legitimate, non-discriminatory and based on business necessity. First, they argue that plaintiff's written and oral communication skills are inadequate for many jobs which plaintiff sought. The documents filed by the defendants support this explanation. There is no indication in the pleadings, nor does plaintiff allege, that any of defendants intended to fire the plaintiff because of these deficiencies. There were many recommendations that plaintiff obtain further education to increase his communication skills, but no indication that plaintiff fulfilled those recommendations.

Second, the defendants acknowledge that the legislative changes, which affected the entire office of Risk Management, created confusion and disruption. Other employees had difficulty adjusting to the changes. Implementation of those changes were not intended to racial discriminate or retaliate against plaintiff.

Third, the defendants argue that they hired an individual with much greater qualifications than plaintiff for a Tort Claims Investigator position that sought. A careful comparison of the qualifications and experience of both plaintiff and the individual hired indicates that this is a true statement. Other than his conclusory and self serving statement, there is no real showing that any of the defendants' explanations are pretextual.

In other words, material facts may be in issue regarding whether plaintiff has sustained the first burden of proof, but there are no material issues of fact

regarding the defendants' burden of proof or the plaintiff's last burden of proof of pretext. There are no material issues of fact that the defendants' employment actions were based on legitimate business reasons and no material issues of fact that those reasons were pretextual. Therefore, the court finds that the employment was justified and not pretextual. Plaintiff's first claim of discrimination fails.

In support of his claim of retaliation, plaintiff shows that he had previously, through prior lawsuits, engaged in a protected activity. Agruably, he suffered an adverse employment action by the defendants' hiring of another individual to fill the Torts Claims Investigator. However, other than his subjective belief, plaintiff offers no evidence to show a causal connection between that activity and the employment action. Several of the defendants were unaware of the lawsuit until plaintiff told them. There was several years between the lawsuits and the

hiring. The record reflects an adequate rationale for hiring the other individual, and no causal connection showing retaliatory action. No material facts are in issue on the third essential element of retaliation and plaintiff's second claim also fails.

The court carefully consider all pleading and arguments presented by the plaintiff to show claims of racial discrimination and retaliation. As stated by the U. S. Supreme Court in Anderson v. Liberty Lobby Inc., 477 U.S. at 252, the non-moving party must present significant probative evidence, beyond a mere existence of scintilla, to support his claims. if the evidence appears so one sided that a reasonable jury could only find for the moving party, then summary judgment may be granted. Here, the plaintiff has not presented significantly probative evidence to support each element of each of his claims, beyond his conclusions and his beliefs. Summary judgment is appropriate

in favor of the defendants.

Because of the court's ruling on the defendant's motion for summary judgment, the remaining motions are now moot.

Therefore, it is hereby

ORDERED that

1) Defendants' Motion for Summary Judgment is GRANTED and plaintiff's claims are DISMISSED.

2) Plaintiff's Second Motion to Compel for Discovery is DENIED AS MOOT;

3) Defendants' Motion to Shorten Time for Defendants' Motion to Dismiss Based Upon Failure to Confer Re Preparation of Pretrial Order is DENIED AS MOOT;

4) Defendants' Motion to Dismiss Based Upon Failure to Confer Re Preparation of Pretrial Order is DENIED AS MOOT;

5) Plaintiff's Motion to Extend Trial Date for Discovery is DENIED AS MOOT;

6) Plaintiff's Motion to Compel for Deposition Subpoena to Mr. Gregg Goins is DENIED AS MOOT; and

7) Plaintiff's Motion to Compel for

Accurate Answers and for Production of Documents is DENNIED AS MOOT.

DATED this 9 day of October, 1991.

Signed by Robert Bryan
United States District Judge

A. Overview

§ 1:1. Generally

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[1] makes it an unlawful employment practice for an employer, employment agency, or labor organization to engage in employment discrimination against any individual because of such individual's race, color, religion, sex, or national origin. Title VII proscribes not only the discriminatorily motivated disparate treatment of statutorily protected individuals[2] but also facially neutral practices which have a disparate impact upon protected individuals.[3] The nondiscrimination prohibitions of Title VII apply to private and to public sector employment, including federal employment.

Title VII was the first major comprehensive piece of federal legislation prohibiting discrimination in private employment based upon race, color, religion, sex, or national origin.[4] (The Reconstruction-era civil rights statutes[5] had not yet been judicially resurrected as a remedy for private employment discrimination.)[6] Congressional consideration of Title VII was marked by tremendous controversy and one of the longest filibus-

1. 42 USCS §§ 2000e-2000e-17.

2. See McDonnell Douglas Corp. v Green (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817.

3. See Griggs v Duke Power Co. (1971) 401 US 424, 28 L Ed 2d 158, 91 S Ct 849.

4. See Morton v Mancari (1974) 417 US 535 at 545, 41 L Ed 2d 298, 94 S Ct 2474.

5. 42 USCS §§ 1981, 1983, 1985(3).

6. See McDonald v Santa Fe Trail Transp. Co. (1976) 427 US 273, 49 L Ed 2d 493, 96 S Ct 2574; Johnson v Railway Express Agency, Inc. (1975) 421 US 454, 44 L Ed 2d 295, 95 S Ct 1716; Jones v Alfred H. Mayer Co. (1968) 392 US 409 at 442 n 78, 20 L Ed 2d 1189, 88 S Ct 2186.

ters in Senate history.[7] Reflecting upon this tortuous passage Judge Goldberg observed that "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication."[8] Notwithstanding the complexity and periodic obscurity of the emergent statutory text,[9] Title VII makes clear that today "national labor policy embodies the principles of nondiscrimination as a matter of highest priority."[10]

B. Coverage

§ 1:2. Constitutional Base

The employment discrimination prohibitions of Title VII reach any employer, employment agency, or labor organization (as statutorily defined) engaged in an industry affecting commerce.[11] Congress relied essentially upon its powers under the Commerce Clause when it enacted Title VII in 1964,[12] and clearly intended that Title VII apply to the fullest jurisdictional breadth constitutionally permissible. Title VII therefore extends not only to activities in interstate commerce but also to activities which in isolation might be considered purely local but which in the interrelation-

7. See generally Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn Law Review 62 (1965); Hill, The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law, 2 UC-Berkeley Industrial Relations Law Journal 1 (1977); Note, Title VII: Legislative History, 7 Boston College Industrial & Commercial Law Review 431 (1966).

8. Sanchez v Standard Brands, Inc. (1970, CA5 Tex) 431 F2d 455 at 460.

9. Cf. Steelworkers of America, etc. v Weber (1979) 443 US 193 at 216, 61 L Ed 2d 480, 99 S Ct 2721 (Burger, C.J., dissenting) ("when Congress enacted Title VII after long study and searching debate, it produced a statute of extraordinary clarity").

10. Emporium Capwell Co. v Western Addition Community Organization (1975) 420 US 50, 43 L Ed 2d 12, 95 S Ct 977.

11. § 701, 42 USCS § 2000e.

12. See 110 Cong Rec 7202-12, 8453-56 (1964); Heart of Atlanta Motel, Inc. v United States (1964) 379 US 241 at 245-46, 13 L Ed 2d 258, 85 S Ct 348.

ships of businesses across state lines adversely affect interstate commerce.[13]

Congress relied essentially upon its powers under the Equal Protection Clause of the Fourteenth Amendment when it enacted the 1972 amendments to Title VII which extended the Act to state and local government employees.[14] In *Fitzpatrick v Bitzer,*[15] the Supreme Court held that the Eleventh Amendment did not bar the award of monetary relief (back pay and attorney's fees) under Title VII from the state treasury, for that Amendment was subject to override by the enforcement provisions of the Fourteenth Amendment. The Court stated: "[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private

13. See NLRB v Reliance Fuel Oil Corp. (1963) 371 US 224, 9 L Ed 2d 279, 83 S Ct 312. See generally Tribe, American Constitutional Law 232-244 (1978).

14. See Fitzpatrick v Bitzer (1976) 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666; EEOC v Pacific Press Publishing Asso. (1982, CA9) 676 F2d 1272; Shawer v Indiana University of Pennsylvania (1979, CA3 Pa) 602 F2d 1161. See generally Note, Title VII and Public Employers: Did Congress Exceed Its Powers, 78 Columbia Law Review 372 (1978).

15. Fitzpatrick v Bitzer (1976) 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666.

suits against States or state officials which are constitutionally impermissible in other contexts."[16]

§ 1:3. Covered Employers

Title VII makes it an unlawful employment practice for an employer to engage in employment discrimination based upon race, color, religion, sex or national origin.[17] Title VII coverage extends generally to any employer[18] who is (1) a person[19] (or agent thereof), (2) engaged in an industry affecting commerce, and/or (3) who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year.[20] Coverage extends to state and local governments, governmental agencies and political subdivisions.[21] Coverage further extends to the federal government and District of Columbia.[22]

Title VII protections extend variously to any individual, applicant, or employee subjected to discrimination arising from an employment setting whether or not an active employment relationship exists.[23] The Act there-

16. *Id.*, at 456.

17. § 703(a), 42 USCS § 2000e-2(a).

18. § 701(b), 42 USCS § 2000e(b) (excluding the United States, Indian tribes, competitive service departments or agencies of the District of Columbia, and certain tax-exempt bona fide private membership clubs).

19. § 701(a), 42 USCS § 2000e(a) (including one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers).

20. § 701(b), 42 USCS § 2000e(b).

21. § 701(a), (b), 42 USCS § 2000e(a), (b). See George v New Jersey Bd. of Veterinary Medical Examiners (1986, CA3 NJ) 794 F2d 113 (Title VII inapplicable to licensing functions of public agency exercised under state police powers).

22. § 717(a), 42 USCS § 2000e-16(a) (excluding federal legislative, judicial, and D.C. noncompetitive service). See also Johnson v Alexander (1978, CA8 Mo) 572 F2d 1219, cert den 439 US 986, 58 L Ed 2d 658, 99 S Ct 579; Gonzalez v Department of the Army (1983, CA9 Cal) 718 F2d 926 (excluding enlisted armed forces personnel or applicants for enlistment). But see Hill v Berkman (1986, ED NY) 635 F Supp 1228 (section 717 applies to uniformed military).

23. See § 703, 42 USCS § 2000e-2. Cf. § 704, 42 USCS § 2000e-3 (nonretaliation provision refers only to employees or applicants). See also Zimmerman v North American Signal Co. (1983, CA7 Ill) 704 F2d 347 (corporate directors and unpaid, inactive officers not employees).

fore generally protects a class broader than direct employees[24] and also protects applicants, dischargees, and pensioners.[25] The Act's protection does not extend generally to independent contractors as defined by the economic realities[26] or right of control[27] tests.

Non-civil service state or local government elected officials and selected staff, policymaking appointees, and advisors, are excluded from employee status under the Act.[28]

Domestic subsidiaries of foreign corporations are covered by Title VII. In *Sumitomo Shoji America, Inc. v Avagliano,*[29] the Supreme Court held that a wholly-owned American subsidiary of a Japanese company, incorporated under New York law, was a United

24. See Sibley Memorial Hospital v Wilson (1973) 160 App DC 14, 488 F2d 1338 (Title VII protects class broader than direct employees and reaches individuals who do not stand in direct employment relationship with an employer).

25. See Wilson v Monsanto Co. (1970, ED La) 315 F Supp 977 (applicants); Johnson v Georgia Highway Express, Inc. (1969, CA5 Ga) 417 F2d 1122 (dischargees); Hackett v McGuire Bros., Inc. (1971, CA3 Pa) 445 F2d 442 (pensioners).

26. See Armbruster v Quinn (1983, CA6 Mich) 711 F2d 1332; Hickey v Arkla Industries, Inc. (1983, CA5 Tex) 699 F2d 748; Spirides v Reinhardt (1979) 198 App DC 93, 613 F2d 826; (1979); Mathis v Standard Brands Chem. Industries (1975, ND Ga) 10 BNA FEP Cases 295.

27. See Cobb v Sun Papers, Inc. (1982, CA11 Ala) 673 F2d 337, cert den 459 US 874, 874, 74 L Ed 2d 135, 103 S Ct 163; Ramirez v San Mateo County Dist. Attorneys Office (1981, CA9 Cal) 639 F2d 509; Owens v Rush (1981, CA10 Kan) 654 F2d 1370; Smith v Dutra Trucking Co. (1976, ND Cal) 410 F Supp 513, affd without op (CA9 Cal) 580 F2d 1054, cert den 439 US 1076, 59 L Ed 2d 43, 99 S Ct 852.

28. § 701(f), 42 USCS § 2000e(f). Held nonexempt, see Anderson v Albuquerque (1982, CA10 NM) 690 F2d 796 (human rights board staff director); Goodwin v Circuit Court of St Louis County (1984, CA8 Mo) 729 F2d 541, cert den 469 US 828, 83 L Ed 2d 55, 105 S Ct 112 (hearing officer and staff attorney); Marafino v St Louis County Circuit Court (1982, ED Mo) 537 F Supp 206, affd (CA8 Mo) 707 F2d 1005 (staff attorney); Murray v District of Columbia Bd. of Education (1983, DC Dist Col) 31 BNA FEP Cases 988 (general counsel); Gearhart v Oregon (1976, DC Or) 410 F Supp 597 (deputy legislative counsel).

Held exempt, see United States v Gregory (1984, WD Va) 582 F Supp 1319 (deputy sheriff); Kyles v Calcasieu Parish Sheriff's Dept. (1975, WD La) 395 F Supp 1307 (deputy sheriff); Owens v Rush (1981, CA10 Kan) 654 F2d 1370 (undersheriff); Ramirez v San Mateo County Dist. Attorney's Office (1981, CA9 Cal) 639 F2d 509 (deptuy district attorney); Wall v Coleman (1975, SD Ga) 393 F Supp 826 (assistant district attorney).

29. Sumitomo Shoji America, Inc. v Avagliano (1982) 457 US 176, 72 L Ed 2d 765, 102 S Ct 2374.

Asso.,[68] Congress did not determine that every governmental entity affected commerce. Accordingly, under this view the requisite commerce nexus must be established in the particular case.

Problems also arise where the represented employees are not employed by employers covered by Title VII. In *Renfro v Office & Professional Employers International Union*,[69] the court held that the union was not a labor organization since the represented employee was the only person employed by the employer (i.e., less than the fifteen-employee prerequisite). The court stated that "[s]ince the Council employs only one individual it is not an 'employer.' For Local 277 to be a statutory 'labor organization' it must deal with a statutory 'employer.' "[70]

C. Definition and Proof of Discrimination

§ 1:6. Generally

Claims of employment discrimination under Title VII may arise in two different ways, disparate treatment or disparate impact.

Disparate treatment cases involve treatment of an individual (or group) less favorably than another because of race, color, religion, sex or national origin. Proof of discriminatory motivation is critical in disparate treatment cases. The Supreme Court has noted that "[u]ndoubtedly disparate treatment was the most

68. EEOC v California Teachers Asso. (1982, ND Cal) 534 F Supp 209.

69. Renfro v Office & Professional Employers International Union (1977, CA5 Tex) 545 F2d 509, reh den (CA5 Tex) 549 F2d 203. Cf. Jennings v American Postal Workers Union (1982, CA8 Mo) 672 F2d 712 (federal employee unions are covered labor organizations).

70. 545 F2d at 510. See Weldon v Board of Education (1975, ED Mich) 403 F Supp 436. See also Phelps v International Molders & Allied Workers Union Local 63 (1981, DC Minn) 25 BNA FEP Cas 1164.

obvious evil Congress had in mind when it enacted Title VII."[71]

Disparate impact cases involve practices which are facially neutral in their treatment of different individuals but which impact more severely on protected groups and cannot be justified by business necessity. Proof of discriminatory motivation is not critical in disparate impact cases. The key is job relatedness. The Supreme Court has noted that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[72]

§ 1:7. Disparate Treatment Framework

In the early years the Supreme Court began to forge a liberal Title VII jurisprudence. Some of the Court's most significant steps related to the very theory of discrimination itself.

In general, the Court first determined that motivated discrimination, that is, disparate treatment based upon considerations of race, color, religion, sex, or national origin, is clearly proscribed by Title VII.[73] Unlawful discrimination simply turns upon proof of invidious intent. This basic disparate treatment theory traced familiar doctrine previously formulated under such antidiscrimination statutes as the National Labor Relations Act (NLRA)[74] which deals with union-motivated discrimination.[75]

Even in the ostensibly elementary articulation of

71. International Brotherhood of Teamsters v United States (1977) 431 US 324 at 335 n 15, 52 L Ed 2d 396, 97 S Ct 1843.

72. Griggs v Duke Power Co. (1971) 401 US 424 at 432, 28 L Ed 2d 158, 91 S Ct 849.

73. See McDonnell Douglas Corp v Green (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817. See generally Player, The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases, 49 Missouri Law Review 17 (1984).

74. 29 USCS §§ 151-170.

75. E.g., NLRB v Great Dane Trailers, Inc. (1967) 388 US 26, 18 L Ed 2d 1027, 87 S Ct 1792; International Brotherhood, T.C.W. & H. v NLRB (1961) 365 US 667, 6 L Ed 2d 11, 81 S Ct 835; Radio Officers' Union of Commercial Telegraphers Union v NLRB (1954) 347 US 17, 98 L Ed 455, 74 S Ct 323.

disparate treatment theory applicable in futuro under Title VII, however, the Court engrafted its own subtle embellishments ineluctably designed to ease the plaintiff-discriminatee's litigation burden. The Court recognized that direct evidence of subjective discriminatory intent is rarely available, particularly to the discriminatee. The Court also recognized that relevant information concerning employment-related decisions (e.g., hiring) is generally under the custody and control of the employer.

To establish a prima facie case of discriminatory refusal to hire, said the Court, the plaintiff need only establish application and qualification for the job, rejection, and a continued job opening.[76] The burden then befalls the defendant to articulate a legitimate nondiscriminatory reason for the rejection. Further, assuming such articulation, the plaintiff is entitled to an opportunity to show that the articulated reason is in fact a pretext. Pretext may be established by evidence or by effective cross-examination.

Development of this evidentiary formulation was an evolutionary process beginning with *McDonnell Douglas Corp. v Green,*[77] a case involving the alleged racially discriminatory refusal to rehire a former employee. In *McDonnell Douglas,* the Court first sought to clarify the standards, order and allocation of proof governing the disposition of private, non-class actions challenging employment discrimination.

One can readily observe that the Court's evidentiary formulation placed a rather minimal initial burden upon the plaintiff-discriminatee. The Court essentially incorporated a substantial presumption of discrimination into the basic disparate treatment case, easily triggered by plaintiffs in most nonfrivolous cases. To establish a prima facie case plaintiff must show that he

76. McDonnell Douglas Corp. v Green (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817.

77. Id., at 792.

THE HONORABLE JACK E. TANNER

Entered on Docket Jul 24 1991

THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT TACOMA

JOHN H. DAVIS,

Plaintiff,

v.

GARY ALEXANDER,

Defendant.

MINUTE ORDER

NO. C-90-5034T

NOW, on this 24th day of July, 1991, the Court directs the Clerk to enter the following Minute Order:

ORDERED all pending dates are hereby stricken. New dates shall be set by the judge to whom this case is assigned.

The foregoing Minute Order entered by (signed name) Deputy Clerk, BY DIRECTION OF THE HONORABLE JACK E. TANNER, UNITED STATES DISTRICT JUDGE.

Booth Gardner Orin C. Smith
Governor Director

STATE OF WASHINGTON
OFFICE OF FINANCIAL MANAGEMENT
Insurance Building, MS. AQ-44. Olympia,
Washington 98504. (206) 753-5450

June 6, 1985

Mr. John Davis
Office of Financial Management
400 Insurance Building
Olympia, Washington 98504

Dear John:

On December 20, 1984, you submitted an updated classification questionnaire of your position, a State Financial Systems Analyst 2, and requested that it be reviewed for a possible upgrade. Since the Office of Financial Management has authority to make allocation determinations with regard to the State Financial Systems Analyst series, I conducted a desk audit to determine proper allocation. As a result of my review, I found that the position did not fit the criteria established for the

State Financial Systems Analyst series nor for any class over which OFM has allocation authority. I then forwarded the classification questionnaire to the Department of Personnel with the recommendation that your position be reallocated to the Claims Representative class. Please refer to your copy of my April 19, 1985 memo to Lisa Skriletz of the Department of Personnel.

On June 3, 1985, I received a letter from Ms. Skriletz approving the reallocation of your position to the Claims Representative class (Range 31), effective July 15, 1985. A copy of this letter is enclosed. In it, Ms. Skriletz clearly outlines her reasoning behind the reallocation and your rights upon notification of this action. If you have any questions, please feel free to call me at 3-5450.

Sincerely,

Sd\

PC:ct Patricia Curry, Personnel Officer

Enclosure
cc: Dan Pensula and Collum Liska.

AN INTERAGENCY AGREEMENT BETWEEN

THE OFFICE OF FINANCIAL MANAGEMENT AND

THE DEPARTMENT OF GENERAL ADMINISTRATION

WHEREAS, chapter 126, laws of 1986 transfers all responsibility for the administration of Sundry Claims against the state of Washington from the Office of Financial Management (OFM) to the State Office of Risk Management (STORM), a division of General Administration (GA), and

WHEREAS, chapter 126, laws of 1986 transfers all responsibility for the administration of Tort Claims against the state of Washington from OFM to STORM of GA, except for the following which shall be retained at OFM:

A. The authority to transfer funds from a tortfeasor agency to reimburse the Tort Claims Revolving Fund, and

B. The authority to relieve an agency of its obligation to reimburse the Tort Claims Revolving Fund, and

WHEREAS, OFM and GA have agreed, as stated

in the attached joint letter to Senator Alen Thompson, dated January 31, 1986, and which shall become part of this Interagency Agreement, that one employee will be transferred from OFM to STORM "to continue to perform his usual duties without any loss of employment rights."

NOW, WHEREFORE, OFM and GA do agree that:

1. July 1, 1986 shall be the effective date for commencement of all provisions in this Interagnecy Agreement, the June 11, 1986 statutory effective date of chapter 126, laws of 1986 notwhitstanding, in order to allow for an orderly fiscal year transfer.

2. June 30, 1987 shall be the expiration date of this Interagency Agreement.

3. OFM employee, John H. Davis, shall be transferred to STORM and OFM shall reimburse GA on a monthly basis up to a total of $31,207 for fiscal year 1987 for all regular salary and employee benefit costs payable for the benefit of one such FTE plus $25 monthly for goods and services

for the term of this Interagency Agreement. All other wage and penalty payments shall be the responsibility of GA and shall be borne totally by GA.

4. Payments for sundry claims that individually total $2,000 or less, as submitted by GA's approved payment document, shall be paid by OFM for the term of this Interagency Agreement, up to the balance of the available allocation that OFM provides to GA on or about July 1, 1986. OFM shall notify Ga monthly of the remaining balance of the available allocation.

5. This transfer is construed as a continuation of an ongoing GA program and as such shall become an integral part of STORM's base allotment for budgeting purposes for the 1987-1989 biennium.

6. OFM agrees to transfer all equipment required by John H. Davis as stated in the attached list and which shall become part of this Interagency Agreement, for the continued performance of duties usual to

his employment at OFM.

7. OFM agrees to transfer all sundry claims and tort claims records, files, and documents to STORM's by or before July 1, 1986.

8. STORM and OFM shall jointly adopt appropriate rules governing the procedures to be followed in reimbursing the Tort Claims Revolving Fund when a torfeasor agency has been relieved of its obligation to reimburse the Tort Claims Revolving Fund.

Signature

Richard A. Virant, Director

Department of General Administration

Dated: 6/26/86

Signature

Orin C. Smith, Director

Office of Financial Management

Dated: 6/26/86

Approved As To Form:

Signature

Assistant Attorney General

Dated: 23 July 1986